Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations	)	CC Docket No. 01-150

REPLY COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"),through undersigned counsel, hereby replies to the comments of other parties on the Declaratory Ruling and Notice of Proposed Rulemaking in the above-referenced proceeding, released July 20, 2001 ("*NPRM*"). Verizon and Qwest Communications International, Inc. ("Qwest") (collectively, the "Dominant Carrier Commenters") essentially urge the Commission to abandon its public interest review of transfer of control applications. Whether a proposed transaction would be in the public interest is always at issue and the Commission's critical function as ultimate determiner thereof is not one which the Commission may choose to forego. For the reasons set forth in ASCENT's comments, ASCENT strongly opposes extension of streamlined treatment to domestic section 214 applications involving dominant carriers. Other commenters, while recognizing the inherent dangers of affording streamlined treatment to domestic section 214 applications involving dominant carriers, nonetheless urge the Commission to afford streamlined treatment to all nondominant carrier applications. As ASCENT also demonstrated, certain transfers of control involving large nondominant carriers will pose similar threats to the public interest (albeit of a somewhat lesser nature than the dangers associated with dominant carrier applications). The appropriate means of addressing such public

interest concerns is not, as advocated by some carriers, the automatic grant of such applications absent public objection and a Commission decision to thereafter remove individual applications from streamlined review. Rather, to avoid the possibility that such applications may unintentionally evade agency review, the wiser course would be the adoption of thresholds, such as those proposed by ASCENT, which would provide an easy means of determining quickly which large nondominant carrier transactions would raise public interest concerns sufficient to warrant more than streamlined review.

At the outset, to the extent the Dominant Carrier Commenters suggest that the Commission should refrain from undertaking a review of domestic section 214 applications sufficient to arrive at an independent public interest determination, they are mistaken. Verizon suggests that "[t]he Commission's proper statutory rule here . . . is not to conduct an overall review of the transfer of control itself or whether the transfer will affect competition in all segments of the telecommunications marketplace"[1] and notes that "[i]f the Commission defers to this comprehensive process and does not attempt to duplicate DOJ's efforts, its review can be substantially reduced in scope and time."[2] Likewise, despite the FCC's obvious expertise in this area, "Qwest recommends that the Commission curtail dramatically its extensive public interest review of license transfers, and defer to the antitrust agencies of the federal government to assess competitive issues that arise in changes of control accompanied by Section 214 applications."[3]

---

1 Comments of Verizon, p. 1.

2 Id.

3 Comments of Qwest, p. 3.

As to the Commission's proper statutory role, that role should certainly include an assessment of the affect of a propose transaction on competition. As noted below, the section 214 application process is sometimes the only vehicle the Commission has for undertaking such an analysis. And however much Verizon and Qwest would like it to be otherwise, the public interest is always at issue. Furthermore, however beneficial (and perhaps even instructive to the Commission) the efforts of the Department of Justice and the Federal Trade Commission in evaluating the benefits and detriments of a proposed transfer of control of one regulated telecommunications entity to another, neither agency can authoritatively speak to telecommunications-specific issues which fall squarely within the scope of the Commission's authority. Nor can they impose specific conditions upon a proposed transaction in order to render an otherwise unacceptable transaction not adverse to the public interest from a telecommunications perspective. Only the Commission can do that, and it should not hesitate to continue doing so whenever the public interest requires.[4]

[4] Qwest disparagingly refers to the Commission's imposition of "'conditions' to the transfer, even in the face of a finding of no competitive harm by a federal antitrust agency. In numerous instances, these reviews have resulted in concessions extracted from the parties desirous of merging, some of which furthered the Commission's policy objectives wholly unrelated to the merits of the 214 application." Comments of Qwest, pp. 8-9. As ASCENT and other parties have reminded the Commission, "[t]he Bell Atlantic-GTE and Qwest-US WEST mergers in particular provide a stark illustration of the need for the Commission to conduct an extensive inquiry of the acquisition of carriers by Bell operating companies ('BOCs') . . . . It was only after a full ventilation of the issues by the Commission and the industry that the BOCs grudgingly agreed to give up ownership and control of assets used to provide in-region long distance services." Comments of AT&T Corp., pp. 15-16. Having held that such conditions were necessary to ensure that the proposed mergers would be consistent with the public interest, the Commission has steadfastly entertained enforcement actions to ensure compliance therewith. The necessity of the conditions, and the necessity of continued Commission involvement to ensure compliance therewith, clearly demonstrates the insufficiency of reliance upon Department of Justice and Federal Trade Commission determinations alone. The public interest which the Commission is bound to protect can only be protected by the Commission.

Qwest also suggests that "the Commission should not wait until the independent antitrust agencies have reviewed a change of control to consider the matter under Section 214."[5] ASCENT agrees that the Commission need not delay its consideration of a section 214 application until after the Department of Justice or the Federal Trade Commission have reached an antitrust determination, and does not believe the Commission has done so. However, because the agency will no doubt find the conclusions of the Department of Justice and the Federal Trade Commission of assistance as it makes its own independent determination, the Commission should certainly not feel compelled to issue a decision without having such assistance available to it. "The Commission's practice of waiting for the completion of independent antitrust review," while it may indeed "lengthen[] . . . the time to close permissible transactions,"[6] is a wise practice which should be continued. And while ASCENT also agrees with Verizon that there is a certain benefit to "all affected parties to have a time certain when applications for changes in corporate control will be acted upon,"[7] it would be inappropriate to elevate this goal over the more pressing goal of protecting the interests of consumers.

---

5 Comments of Qwest, p. 9

6 Id.

7 Comments of Verizon, p. 3.

All commenters support the Commission's ultimate goal of reducing administrative burdens through the streamlining of existing processes, where such streamlining can be undertaken without risk to the public interest. ASCENT agrees with WorldCom, Inc. ("WorldCom"), however, that in its consideration of the extent to which policies concerning domestic section 214 applications may be so streamlined, "the Commission should ensure that important public interest concerns, such as the control of the exercise of market power and the promotion of competition in the local exchange market, are adequately protected by its new streamlining rules."[8]

As ASCENT pointed out in its comments, there is good reason that the Commission ultimately allowed the GTE/Bell Atlantic and SBC/Ameritech mergers to proceed only after a consideration of all major issues which lasted, in the first instance eight months and in the latter, well over a year. The Commission ultimately determined that the mergers would not be adverse to the public interest only after the parties agreed to conditions which the Commission felt were necessary to "substantially mitigate the potential public interest harms of the proposed merger."[9] "These conditions and others," held the Commission, "make competition . . . more likely, thereby offsetting in part the competitive threat that each Applicant posed to the other."[10]

---

[8] Comments of WorldCom, Inc., p. 5.

[9] Application of GTE Corporation and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License (Memorandum Opinion and Order), 14 FCC Rcd. 14712, ¶ 349 (1999).

[10] Id., ¶¶ 351, 352.

By their very nature, transactions involving dominant carriers will always warrant careful review to prevent the exercise of market power in a manner which may negatively impact competition. Thus, ASCENT continues to strongly urge the Commission not to extend streamlined review to any domestic section 214 application involving a dominant carrier.[11] Toward that end, the Commission should reject Qwest's requests that the Commission adopt "a shortened review period for both dominant and non-dominant carriers that are *not* covered by a blanket authorization, with an automatic grant of approval of the 214 application if the Commission fails to act within 31 days,"[12] "an automatic grant of a Section 214 application filed by *any* domestic carrier unless the Commission seeks additional information from the carrier within 31 days of the Commission's *Public Notice*,"[13] and "[i]n the event the Commission is unwilling to treat dominant and non-dominant carriers under the same rule . . . a deemed granted presumption for dominant carriers at the end of 60 days, after public notice."[14]

---

[11] ASCENT also notes that Qwest is incorrect when it asserts, "it cannot be said that *carriers* are dominant or not; rather the question is whether the relevant *service* offered by the carrier is one over which the carrier has market power." Comments of Qwest, p. 2. It certainly can be said whether carriers are dominant, and the Commission, for good reason, continues to classify Bell Operating Companies as dominant. Carriers which are dominant with respect to any service they provide raise public interest concerns which the Commission must thoroughly examine. Streamlined treatment would preclude the the Commission from adequately examining such issues.

[12] Comments of Qwest, p. 2.

[13] Id., p. 5. (Emphasis added.)

[14] Id., p. 7.

Likewise, the Commission should reject Verizon's proposal that "[t]he Commission should define as non-controversial (1) any application for a change in corporate control in which all of the principals have been classified as 'non-dominant,' and (2) any such application in which one of the parties is classified as 'dominant,' but where all other entities involved in the transaction had revenues from regulated telecommunications operations in the previous year that were below the revenue threshold to be considered a 'Class A' company under Part 32 of the Commission's rules, *i.e.,* $100 million."[15] As the GTE/Bell Atlantic and SBC/Ameritech proceedings and events subsequent to grant of approval very amply demonstrate, the possible combination of a dominant carrier with another entity simply holds too great a potential for negatively impacting the public interest to warrant anything but a thorough review. A streamlined process is simply inadequate to properly address concerns which will be raised in such circumstances. Accordingly, ASCENT fully concers with AT&T Corp. ("AT&T") that "streamlined treatment is not appropriate for section 214 applications involving dominant carriers, especially local exchange carriers ("LECs").[16]

Furthermore, even section 214 transfer of control applications involving large nondominant carriers will occasionally give rise to public interest concerns sufficient to warrant more than streamlined review. In the vast majority of cases, nondominant carrier transfer of control applications will likely be "unobjectionable and non-controversial."[17] However, it is too broad a statement to assert, as WorldCom does, that with respect to "transfers or assignments involving only non-dominant carriers . . . [t]his type of transaction does not raise public interest concerns."[18] The

---

15 Comments of Verizon, p. 5.

16 Comments of AT&T, p. 3.

17 Comments of Qwest, p. 6.

18 Comments of WorldCom, p. 6.

Commission's consideration of the transfer of control applications of AT&T and Tele-Communications, Inc., as well as WorldCom and MCI Communications Corporation, demonstrate that issues impacting the public interest will occasionally arise, and will require due Commission deliberation, even when no party to the transaction is classified as "dominant." Indeed, the Commission required slightly longer than six months to evaluate and issue an order approving the former application, and more than 11 months to approve the latter.[19]

[19] Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee (Memorandum Opinion and Order), 14 FCC Rcd. 3160 (1999); Application of WorldCom, Inc. and MCI Communications Corporation, for Transfer of Control of MCI Communications Corporation to WorldCom, Inc. (Memorandum Opinion and Order), 13 FCC Rcd. 18025 (1998).

Upon further review, WorldCom's position appears to be somewhat softer; not, as first stated, that large nondominant carrier transfer of control applications will never raise public interest concerns, but rather that such public interest concerns need not bother the Commission within the section 214 context since "transfers or assignments involving large non-dominant carriers will be governed by spectrum license procedures that will require a full-blown public interest statement, comment cycle, and Bureau(s) or Commission order. In WorldCom's view, it is only the smaller, fiber optic-based interexchange and competitive local exchange carriers who would operate solely pursuant to a domestic 214. Transactions involving these carriers, even if purchased by a large non-dominant carrier, raise no public interest issues."[20]

Unfortunately, WorldCom's view is not entirely correct. It will not always be the case that spectrum license procedures will be available as a mechanism to allow the Commission to fully investigate the bona fides of a proposed transaction involving large nondominant carriers. The application of Tele-Communications, Inc. and AT&T, both nondominant carriers (and AT&T undeniably a "large" nondominant carrier), was brought before the Commission pursuant to only section 214. The Commission should refrain from eliminating the section 214 review mechanism, and should certainly not do so based upon the continuing existence of spectrum license procedures which may or may not be applicable to particular proposed transactions.

[20] Comments of WorldCom, pp. 6-7.

While WorldCom admits that "potential public interest concerns could be raised in a transfer or assignment to or from a non-dominant carrier to a dominant carrier,"[21] it mistakenly believes the Commission may sufficiently address those concerns merely by applying advanced notice filing requirements to such transactions. As noted above, no type of streamlined treatment should ever be afforded dominant carrier transfer of control applications. WorldCom is also incorrect that "after-the-fact notice to the Commission is sufficient for transfers or assignments involving only non-dominant carriers."[22] Whenever public interest concerns arise, the Commission must address them.

The Competitive Telecommunications Association ("CompTel") urges the Commission to "eliminate unnecessary and burdensome regulatory requirements for smaller carriers"[23] but, like WorldCom, would have the Commission do so "by eliminating the requirement to obtain transfer of control authority for all non-dominant carriers that operate under blanket domestic Section 214 authorizations."[24] ASCENT agrees that the exercise of Commission authority over domestic section 214 transfer of control applications involving small carriers, applications which are extraordinarily unlikely to implicate the public interest, would be wasteful and inefficient. However, by advocating that the Commission should forbear from enforcing its section 214 rules whenever a nondominant carrier, no matter how large, is involved, CompTel's position is simply too far-reaching.

---

21 Id., p. 7.

22 Id.

23 Comments of the Competitive Telecommunications Association, p. 1.

24 Id.

In support of its position, CompTel focuses on the concept that "[i]t is not necessary for the Commission to require domestic non-dominant carriers operating under blanket Setion 214 authority to obtain approval for transfers of control to ensure that these carriers' rates, terms and conditions are just and reasonable and not unjustly or unreasonably discriminatory."[25] Unfortunately, in cases where very large nondominant carriers are involved, it will not always be the case that "(2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest."[26] And while ASCENT agrees that "[t]he fact that state commissions will also be reviewing transfers of control raising competitive concerns provides additional assurance that the interests of consumers will be protected in these transactions,"[27] a state commission review proceeding would address only state-specific concerns. It is, and will remain, the Commission's obligation to independently investigate whether the public interest supports grant of a transfer of control involving large nondominant carriers on an interstate basis.

In the final analysis, ASCENT agrees that "[t]here is no need to require thousands of transactions to be burdened with domestic transfer of control requirements simply on the remote chance that one or two of them might present a public policy issue."[28] Neither, however, is there a need to allow those one or two applications to bypass Commission review. The Commission has requested, and ASCENT has provided, a vehicle pursuant to which the Commission may retain adequate oversight of those transfer of control applications brought by nondominant carriers whose proposed combinations are likely to impact the public interest, while affording streamlined treatment

---

25 Id., p 2.

26 Id.

27 Id., p. 3.

28 Id.

to the remainder (the vast majority) of such applications. By adopting the threshold showings suggested by ASCENT, the Commission would indeed "eliminate unnecessary and burdensome regulatory requirements for smaller carriers," as urged by CompTel, without abdicating in any way its obligation to protect the public.

AT&T posits that the Commission should "establish a bright-line standard that protects the public interest by promulgating a rule that presumptively streamlines applications by non-dominant carriers to assign or transfer section 214 authorizations."[29] As noted above, however, the dominant/nondominant dichotomy would fail "to allow for the full and fair review of the very few non-dominant carrier transactions that raise significant public interest issues (*e.g.*, the proposed Sprint-WorldCom merger),"[30] even if the Commission retains, as it should, "full discretion to pull any application out of the streamlined 'queue'."[31]

Pursuant to the thresholds suggested by ASCENT, domestic transfer of control applications for corporate control would be eligible for streamlined treatment whenever (i) neither carrier has net telecommunications sales or total telecommunications revenues in excess of $500 million annually, and (ii) neither carrier possesses a market share of at least 10,000 high-speed service lines in any LATA (or 25,000 in any state) or 250,000 voice grade equivalent lines or wireless channels in any LATA (or 750,000 in any state). The threshold showings proposed by ASCENT are designed to assist the Commission in identifying quickly and easily those few nondominant carrier proposed transfers of control which hold the realistic potential to adversely impact the public interest.

---

29 Comments of AT&T, p. 2.

30 Id.

31 Id.

AT&T asserts that "[t]here is simply no correlation between a firm's absolute size (whether measured in terms of assets or sales) and market power."[32] Continuing its discussion of the inappropriateness of using sales or revenue figures as a factor in analyzing whether a particular transaction might be afforded streamlined treatment without danger to the public interest, AT&T observes that if two very large entities, General Electric and General Motors, for example "were to merge. . . [t]he merging parties would quite obviously be unable to exercise power in any relevant telecommunications market"[33] As to AT&T's first point, both size and revenue factors are relevant to Hart-Scott-Rodino review, an analysis aimed at identifying potential public interest concerns arising from market combinations. Furthermore, ASCENT's proposed thresholds are specifically tied to to consideration of telecommunications-specific sales, revenues and market operations, all extremely relevant factors and strong indicators of market presence sufficient to give rise to public interest concerns.

AT&T also observes that "[e]xempting 'small' non-dominant carriers from regulatory burdens while continuing to impose such regulations on 'large' non-dominant carriers 'only reduces competitive performance in the market."[34] It may be true that such a striated model would slow the ability of large nondominant carriers to consummate certain proposed transfers; however, this minor time lag is more than justified by the Commission's need to ensure such actions will only be consummated when supported by the public interest. Recognizing, as it does, that "in rare circumstances, even transactions involving non-dominant carriers can raise significant public

---

32 Comments of AT&T, p. 8.

33 Id., p. 9.

34 Id., pp. 8-9.

interest issues,"[35] AT&T should surely be willing to demonstrate the bona fides of a proposed transfer of

[35] Id., p. 13.

control, as it has done in the past, in the event it is involved in a transaction in which both carriers cannot satisfy the enunciated threshold criteria.

With respect to discontinuance issues, ASCENT agrees with WorldCom that "DSL customers need longer than 31 days to make alternative service arrangements"[36] and that "CLECs that own their own facilities to the customers need longer than 31 days to make alternative service arrangements."[37] ASCENT disagrees, however, that "30 days' advance notice should be sufficient for transfers involving customers of UNE-P based CLECs."[38] Just like competitive local exchange carriers ("CLECs") that "own their own facilities to the customer," UNE-P based CLECs will also often require more than 30 days' advance notice to facilitate the transfer of customers. Migration of customers being served through the use of UNEs will often require coordinated central office-based manual provisioning. It is not unusual for incumbent LEC resource limitations to necessitate a ramp-up of the daily number of customers capable of transfer, with the time required to complete the necessary "hot cuts" virtually certainly exceeding 30 days whenever more than a very small number of customers are involved."

ASCENT joins WorldCom is urging the Commission "to extend this [discontinuance] period to at least 60 days,"[39] not only with respect to DSL customers and facilities-based CLECs but also with respect to CLECs providing service by means of unbundled network elements.

---

36 Comments of WorldCom, p. 10.

37 Id., p. 12.

38 Id.

39 Id., p. 10.

In keeping with the above, ASCENT respectfully urges the Commission to refrain from affording streamlined treatment of domestic section 214 applications involving dominant carriers, as well as to applications involving nondominant carriers which cannot satisfy the threshold criteria proposed by ASCENT. ASCENT also urges the Commission to extend the service discontinuance period to at least 60 days in circumstances impacting advanced services customers, facilities-based competitive LECs and competitive LECs service customers by means of unbundled network elements.

Respectfully submitted,

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

By:_____

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1424 Sixteenth Street, N.W., Suite 105
Washington, D.C. 20036
(202) 293-2500

October 9, 2001

Its Attorneys